No.

IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM

WARREN A. WILKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN NOT DISMISSING AN INDICTMENT ALLEGING A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 912 FOR ITS FAILURE TO CHARGE AN "INTENT TO DEFRAUD"

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OPINIONS BELOW

No opinion was written by the United States District Court for the Western District of Pennsylvania.

An opinion was written by the United States Court of Appeals for the Third Circuit and is set forth in the appendix at 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on April 19, 1984, affirming petitioner's conviction in the United States District Court for the Western District of Pennsylvania.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon the United States Supreme Court to review the final judgment of the Third Circuit Court of Appeals by writ of certiorari. Pursuant to Rule 20.4 and 29.1 of the United States Supreme Court, the time for filing a petition for writ of certiorari began to run on April 19, 1984 and expires on June 18, 1984.

STATUTE INVOLVED

Title 18, United States Code, Section 912:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT OF THE CASE

Warren A. Wilkes appealed to the United States Court of Appeals for the Third Circuit from a Judgment of Conviction and Sentence entered against him following a jury trial in the United States District Court for the Western District of Pennsylvania. The United States District Court had subject matter jurisdiction pursuant to Title 18, United States Code, Section 3231.

The indictment charged 11 counts. Count one alleged Wilkes violates Title 18, United States Code, Section 912, by falsely pretending and assuming to be an officer and employee of the United States, a social security administration employee, and that acting under the authority thereof had taken upon himself to act as such. (Appendix at 3a).

Counts 2 through 11 alleged Wilkes, on ten specific occasions, did falsely pretend to be a social security administration employee, and that in such a pretended character, did obtain certain sums of money from Raymond Bender. (Appendix at 3a).

On December 9, 1982, Joseph Bender, a brother of Raymond Bender, wrote a complaint to the Federal Bureau of Investigation concerning an alleged social security fraud. In the complaint, Joseph Bender stated that a Warren A. Wilkes was impersonating a social security administrator employee in collecting money from his brother, Raymond Bender, as overpayments of social security benefits.

After receiving the complaint, the F.B.I. interviewed Raymond Bender. Following the interview, the F.B.I. contacted Raymond Bender to sign a consent form for the installation of a tape recording device on his telephone. On December 20, 1982 Raymond Bender had a telephone conversation with Warren A. Wilkes which was recorded and introduced at the trial. According to the telephone call, Wilkes was to stop by the residence of Raymond Bender on December 21, 1983. Wilkes arrived at Raymond Bender's house on December 21, 1983 and picked up $50.00 from Raymond Bender. After receiving the money, the F.B.I. arrested Wilkes outside the Bender residence.

A jury trial commenced on March 14, 1983 in the United States District Court for the Western District of Pennsylvania. After the Government rested its case, defense counsel moved to dismiss the indictment for failure to charge an "intent to defraud" in any of the counts. The trial court denied the motion and later concluded that the intent to defraud is not an element of the offense charged by Title 18, United States Code, Section 912.

The trial concluded on March 16, 1983 when the jury returned a verdict of guilty on all counts. On April 18, 1983, Wilkes was sentenced to 18 months under count one; 18 months under count two, to run concurrently with count one, and the trial court suspended imposition of sentence on counts three to eleven. Wilkes filed a timely notice of appeal from that judgment. Wilkes is currently on bond pending this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED IN NOT DISMISSING AN INDICTMENT ALLEGING A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 912 FOR ITS FAILURE TO CHARGE AND "INTENT TO DEFRAUD."

Wilkes submits that this Court should grant his Petition for Writ of Certiorari because the Third Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Fifth Circuit Court of Appeals on the same matter. Wilkes also submits that the Third Circuit Court of Appeals had decided an important question of federal law which has not been settled by this Court. Further, the Third Circuit Court of Appeals has decided a federal question in a way that conflicts with the decision of this Court in United States v. Lepowitch, 318 U.S. 702 (1943).

The Circuits have split on the issue of whether an "intent to defraud" is an element of Title 18 U.S.C. 912 that must be charged in the indictment. Several circuits, along with the Third Circuit, have ruled that intent to defraud is no longer an element that need be charged in an indictment alleging violation of 18 U.S.C. 912. See United States v. Cord, 654 F.2d 490 (7th Cir. 1981); United States v. Robbins, 613 F.2d 688 (8th Cir. 1979); United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976); United States v. Rose, 500 F.2d 12 (2nd Cir. 1974), vacated on other grounds, 422 U.S. 1031-32 (1975); United States v. Mitman, 459 F.2d 451 (9th Cir.), cert. denied 409 U.S. 863 (1972); United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

The Fifth Circuit has ruled to the contrary. See United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980); United States v. Randolph, 468 F.2d 367 (5th Cir. 1972); Hanes v. United States, 344 F.2d 798 (5th Cir. 1965).

In the 1948 revision of the Criminal Code, the language "intent to defraud either the United States or any person" was deleted from 18 U.S.C. 912's predecessor statute. 18 U.S.C. 76 (1940). The controversy centers on the legislative note found at 18 U.S.C. 912 (1982). The historical or revision notes indicate that the omitted language was rendered meaningless in view of this Court's decision in Logewitch, supra.

The Circuit Court then looked to Logewitch to determine whether intent to defraud must be alleged in the indictment. The Fifth Circuit holds that the 1948 revision was not suppose to change the substance of the law. See Hanes v. United States, 344 F.2d at 801-02.

In order to resolve a conflict among the Circuits and to promote the uniformity of the interpretation of this Court's decision in United States v. Logewitch, Wilkes requests this Court to grant his Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

DATED: June 13, 1984

Respectfully submitted,

GEORGE F. SCHUMSCHER
Federal Public Defender

BY: _____
James M. Wade
Assistant Federal
Public Defender
Counsel of Record

CERTIFICATE OF SERVICE

I, James V. Wade, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were mailed this day to the following:

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of the United States
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Washington, D.C. 20530

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DATED: June 13, 1984

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5301

UNITED STATES OF AMERICA

v.

WILKES, WARREN A. a/k/a John Williams

Warren A. Wilkes,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA - PITTSBURGH
(D.C. Criminal No. 83-00006-01)

Submitted Pursuant to Rule 12(6)
January 10, 1984

Before: ALDISERT, HIGGINBOTHAM and SLOVITER,
Circuit Judges.
(Filed: April 19, 1984)

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APPENDIX 1a-1-

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

The defendant-appellant Warren A. Wilbes, also known as Jake Williams, appeals, *inter alia*, from a judgment of conviction and sentence of 18 months' imprisonment for false personation in violation of title 18, United States Code, section 912, 18 U.S.C. § 912. The defendant asks this court to hold that counts of an indictment are fatally defective where it is charged that a defendant "did falsely pretend and assume to be an officer and employee of the United States," and who "did falsely take upon himself to act as such" (Count 1) and who "in such pretended character did obtain" sums of money (Counts 2-11) in violation of 18 U.S.C. § 912. The defendant claims that these counts are defective because they do not specifically allege an "intent to defraud."[1]

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1. Warren A. Wilbes raises three additional contentions. First, Wilbes argues that the district court erred in admitting into evidence Wilbes' spontaneous statements made at the time of arrest to an FBI agent expressing a willingness to make

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The question of whether a criminal indictment need expressly allege an "intent to defraud" to make out a section 912 offense has not been considered before by this court. We hold that the indictment need not allege an intent to defraud and thus we align this court with the majority of courts of appeals on this issue. We therefore will affirm the conviction and sentence below.

I.

The evidence presented at trial established that on several occasions, the defendant, Warren A. Wilkes, claimed he was a Social Security Administration employee and collected money from Raymond Bender ("Bender"), a 62-year-old disabled veteran, as alleged overpayments in the disability benefits Bender was receiving from the Social Security Administration. According to the government's evidence, the defendant contacted Bender by telephone on September 7, 1982 and identified himself as Jake Williams, an employee of the Social Security Administration, who was calling on behalf of Warren A. Wilkes. The defendant informed Bender that Bender had received an excess of $160 in disability benefits which he was required to repay in order to remain eligible for future benefits. The defendant indicated that he would collect the "overpayment" the following day.

The evidence further establishes that on September 8, 1982, the defendant arrived at the

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institution. Second, Wilkes maintains that the district court erred in refusing to take judicial notice of the definition of schizophrenia and accordingly instructing the jury.
Finally, Wilkes asserts that it was plain error for the district court to admit into evidence a taped telephone conversation obtained without a voluntary consent.
Having considered the record before us carefully and the applicable law, we hold that these arguments have no merit and do not warrant any discussion.

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Bender residence, identified himself as Jake Williams from the Social Security Administration and requested Bender to give him checks totaling $160 payable to Warren A. Wilkes. The defendant repeated this procedure on numerous occasions and demanded repayment of alleged overpayments in amounts ranging from $50 to $125.

Mr. Joseph Bender, Raymond Bender's brother, suspicious of Jake Williams, ultimately filed a complaint with the Federal Bureau of Investigation ("FBI"). FBI agents interviewed Raymond Bender and recorded a December 20, 1982 telephone conversation between the person identifying himself as Jake Williams and Raymond Bender, having obtained Bender's prior consent to do so. During the course of the conversation, the caller told Bender that he had to repay a sum of $50. The following day, the defendant arrived at Mr. Bender's residence, claiming to be Jake Williams. He collected the $50 and was arrested on the scene by FBI agents.

At the conclusion of the government's case, the defendant moved to dismiss the indictment for failure to charge "intent to defraud" in any of the eleven counts. The trial court denied the motion, concluding that intent to defraud need not be specifically alleged. The trial court determined that although the indictment did not specifically allege an intent to defraud, it charged in the exact terminology of the statute that the defendant pretended to be an employee of the United States acting under the authority thereof, that the defendant acted as such and that in such pretended character demanded and indeed obtained money from Raymond Bender in violation of section 912. Therefore, the trial court concluded that it was unnecessary for the indictment to allege an intent to defraud.

The jury returned a verdict of guilty on all counts from which the defendant appeals.

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II.

The defendant reserves on this appeal his assertion that a specific intent to defraud is a necessary element of the offenses prohibited by section 912. Apparently the basis for this position is found in the fact that the offense of falsely personating an officer or employee of the United States expressly required an "intent to defraud" in the statute as originally enacted in 1866:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and [1] shall take upon himself to act as such, or [2] shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 76 (1940)(emphasis added).[1] This provision remained unchanged until the penal code was revised in 1948.

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1. For the sake of convenience and clarity of discussion, we will adopt the practice of other courts of inserting bracketed numerals to distinguish between the separate offenses contained in this provision. Section 912 specifies two distinct crimes: clause [1] makes it an offense to pretend to be an officer or employee of the federal government and to act as such while clause [2] prohibits the demanding of and the obtaining of any money, paper, document or thing of value while in such pretended character. See e.g. United States v. Rosen, 520 F.2d 852, 854 n.4 (D.C. Cir. 1975).

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In the 1948 revision of the criminal code, the language "intent to defraud" was deleted from the statute and that section was recodified as section 912, 18 U.S.C. § 912. As revised, section 912 now reads:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, [1] and acts as such, [2] or to such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 912 (1982).[3]

The only explanation for the deletion is provided in the Historical or Revision Notes: "The words 'with the intent to defraud the United States or any person' contained in said section 76 of Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of United States v. Lepowitch (Lepowitch), 318 U.S. 702 (1943)." Legislative Note, 18 U.S.C. § 912 (1982). We thus turn to the 1943 Supreme Court decision of United States v. Lepowitch, 318 U.S. 702 (1943), in order to determine how the phrase "intent to defraud" became meaningless in light of that decision.

In Lepowitch, the defendants pretended to be FBI agents in order to obtain information concerning another individual's whereabouts. The trial court sustained a demurrer to the indictment which charged the defendants with a violation of section 76, reasoning that the defendants' conduct, "'while highly reprehensible, does not come within the terms of the statute,'" and concluded that count one of indictment did not adequately allege either impersonation or

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3. See note 2 supra.

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acting with intent to defraud. The government did not seek review of the district court's ruling on count two which was based on part [2] of section 76. *Id.* at 703 (quoting *United States v. Lepoutich*, 48 F.Supp. 846, 847 (1942)).

The Supreme Court reversed. The Court compared the two clauses of section 912 and reasoned that clause one, the only one in consideration in *Lepoutich*, concerned the "deceitful attempt to affect the course of action of another" whereby a person could be defrauded without having parted with something of measurable value. *Id.* at 704. Clause two, on the other hand, was construed in dictum as requiring something more, as in the nature of an intent to obtain a "valuable thing." *Id.* at 705. As to the indictment, the Court reasoned that had "the statutory language . . . alone been used, the indictment would have been proof against demurrer . . . ." *Id.* at 704.

The Supreme Court held that "the words 'intent to defraud' in the context of this statute, do not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *Id.* In our view it is this definitional statement which purportedly rendered the earlier requirement of an "intent to defraud" "meaningless" in the minds of the revisers of this section of the criminal code.

In the present case, with this background in mind, we must decide whether an express allegation of fraudulent intent is required in order to charge a violation of 18 U.S.C. § 912.

It is the defendant's position that, even though Congress dropped this language from the statute when it was revised in 1948, "intent to defraud" is still an essential element of a section 912 violation and must be expressly alleged in the indictment or the

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indictment is invalid. In support of his position, the defendant urges this court to adopt the Fifth Circuit's interpretation of the holding in *Lepowitch* and the legislative intent regarding the 1948 penal code revision.

The Fifth Circuit adheres to the precept that "intent to defraud" remains an element of the crime of falsely personating a federal officer or employee and must be charged in the indictment as to either section 912[1] or section 912[2]. Because the words of the statute are viewed as omitting an essential element of the offense, the Fifth Circuit requires that the indictment supply it with certainty. *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980)(section 912[1] offense); *United States v. Randolph*, 460 F.2d 367 (5th Cir. 1972)(section 912[1] offense); *Hanon v. United States*, 344 F.2d 796 (5th Cir. 1965)(section 912[2]).

The Fifth Circuit stands alone in its interpretation of the requirements of indictments alleging violations of section 912[1] and [2]. All of the other six circuit courts of appeals which have considered this issue disagree with the Fifth Circuit's interpretation of *Lepowitch* and the subsequent penal code revision. Specifically, recent decisions in the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits have held that an indictment alleging a violation of either section 912[1] or 912[2] need not charge a specific intent to defraud to be sufficient.

In *United States v. Guthrie*, 387 F.2d 569 (4th Cir. 1967), the Fourth Circuit did not consider the congressional change as inadvertent due to a misunderstanding of *Lepowitch*. The court interpreted the 1948 revision of Section 912 to mean that intent to defraud was no longer an element of the false personation statute and need not be alleged in an indictment or proved at trial. The *Guthrie* defendants had impersonated federal bank examiners in violation

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of part (1) of section 912. The court reasoned that whether or not the amendment was in fact necessitated by the Supreme Court's holding in *Lepowitch*, Congress apparently accepted the Reviser's view and thus relied upon the "accepted canon of statutory construction that where Congress has advertently changed the legislative language the change must be given effect" to support the conclusion that intent to defraud is no longer an element under section 912(1). *United States v. Guthrie*, 387 F.2d at 571. The deletion of the intent language amounted to a recognition that "the injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent." *Id.*

The *Guthrie* rationale, although applied in the context of a section 912(1) violation and expressly rejected by the Fifth Circuit in *United States v. Randolph*, 460 F.2d at 370, has been followed and modified by other circuits as well as expanded to include offenses under 912(2). The common thread in these decisions is that the analysis of *Lepowitch* and the subsequent legislative revision in 1948 is directly contrary to the Fifth Circuit's approach. *See United States v. Cord*, 654 F.2d 490 (7th Cir. 1981)(section 912(2)); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979)(section 912(2)); *United States v. Rosser*, 528 F.2d 652 (D.C.Cir. 1976)(section 912(1)); *United States v. Rose*, 500 F.2d 12 (2d Cir. 1974)(section 912(2)); *United States v. Witman*, 459 F.2d 451 (9th Cir. 1972)(section 912(2)).

In the case of *United States v. Rosser*, 528 F.2d 692 (D.C.Cir. 1976), the court held that an indictment sufficiently charged that the defendant acted as an Internal Revenue Service employee in violation of section 912(1) even though the indictment did not charge that the defendant did so with an intent to defraud. The approach of the District of Columbia

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Circuit in that case has been followed in other cases involving section 912[1] offenses which have held that "intent to defraud" is not an essential element.

The District of Columbia Circuit attempted to reconcile the divergent rationales of *Hanes* and *Guthrie* in *Rosser*. The *Rosser* court agreed with the Fifth Circuit's interpretation of *Lepowitch* in *Randolph* to the extent that *Lepowitch* did not hold that an allegation of intent to defraud was unnecessary but framed the issue before it as "whether intent to defraud as defined by *Lepowitch* could reasonably have been considered by Congress to be present whenever the elements retained in the 1948 revision are proven." 328 F.2d at 655 n.13. In attempting to reconcile the conflicting interpretations of congressional intent, Judge Skelly Wright articulated the following rationale and approach:

> We agree with the Fifth Circuit that Congress did not intend to increase the scope of the false personation statute by adopting the revisers' draft of Section 912. We also agree with the Fourth Circuit that courts should be extremely hesitant to read back into the statutory definition of a crime words specifically excised by Congress. Fortunately, these conclusions are not irreconcilable.
>
> The crime defined by Section 912[1] has two elements: falsely pretending to be an officer or employee of the United States, and acting "as such." If acting "as such" is understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold, the concerns of both the Fifth and Fourth Circuits can be accommodated. Attempting to exercise pretended authority is far more offensive to the interests of the United States than is "mere

> bravado." Moreover, it seems reasonable for Congress to have concluded that virtually everyone who pretends to be an officer or employee of the United States and to some manner asserts authority by acting "as such" seeks "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." United States v. Lepowitch, supra, 318 U.S. at 704, 63 S.Ct. at 916. Thus elimination of intent to defraud as an element of the crime defined by Section 912[1] does "not overrule Lepowitch by relegislation or * * * modify the substance of the provision." Nunez v. United States, supra, 344 F.2d at 802.
>
> Our understanding of the meaning of "acts as such" in Section 912[1] explains the reviewers' use of the word "meaningless"--after *Lepowitch* the intent to "defraud" requirement is surplusage.

Id. at 656 (footnotes omitted). Congress thus recognized that the words "intent to defraud" were meaningless since intent to defraud as defined by the Supreme Court in Lepowitch would be present whenever the element "acting as such" was proven. Accord, United States v. Robbins, 613 F.2d 688, 690-92 (6th Cir. 1979).

Unlike section 912[1], as the Lepowitch Court indicated by way of dictum, section 912[2] requires more than an exertion of pretended authority to complete the crime. The offense is committed if an impersonator demands or obtains something of value in the guise of a federal officer or employee rather than in some other capacity unrelated to the false personation. See United States v. Cord, 694 F.2d at 492. In Cord, the defendant obtained $6,000 on the pretext of conducting an FBI investigation and the Seventh Circuit stated that:

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> where one is deceived into giving up something of value, as required by the second part of the statute. It is even more implausible that the purpose is pure. Thus there need be no allegation of fraudulent intent since allegation of acts sufficient to violate part two would satisfy the Lepowitch definition.

Id. (emphasis added). Thus, "[t]he requirement of § 912[2] that the money or thing of value be demanded or received in 'pretended character' adequately covers the possibility raised by the Lepowitch definition that the impersonation did not affect the actions of the person deceived." United States v. Rose, 500 F.2d at 16, vacated on other grounds, 422 U.S. 1031-32 (1975).

The overwhelming weight of the authority thus goes against the conclusion of the Fifth Circuit and the approach advocated by the defendant. As the Eighth Circuit remarked in United States v. Robbins, 613 F.2d at 691, we too "question the wisdom of requiring that an indictment allege an 'intent to deceive' when the reviser's note to the statutory change indicated that the words were rendered 'meaningless' by a decision of the United States Supreme Court." Moreover, we are mindful of the District of Columbia Circuit's admonition that "courts should be extremely hesitant to read back into the statutory definition of a crime words specifically excised by Congress." United States v. Russell, 528 F.2d at 656; See United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

We believe that "intent to defraud" as defined by Lepowitch could reasonably have been considered by Congress to be present whenever the elements retained in section 912 are proven, and thus we hold that an indictment alleging violations of title 18, United States Code, section 912[1] or [2] need not specifically allege an intent to defraud. An intent to defraud as defined in Lepowitch is present for a section 912[1] offense

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whenever the element "acting as such" is proven and need not be specifically alleged. Similarly, an intent to defraud is present for purposes of a section 912[2] offense whenever one demands or receives money or a thing of value in "pretended character," acting under the authority of the United States. Thus, we conclude that the statutory language contains the necessary elements of the offense and an indictment alleging all of the necessary elements is sufficient. Russell v. United States, 369 U.S. 749, 763-64 (1962); United States v. Brandon, 601 F.2d 1251, 1258 (3d Cir. 1979).

III.

Having determined that a criminal indictment charging a violation of section 912 need not allege a specific intent to defraud, we will now examine the indictment in question to determine whether it is sufficient.

Count I of the indictment in issue charged the defendant with a section 912[1] offense. Specifically, it charged: "WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such."[6] Counts II through III charged

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6. Count I of the indictment charges that:

> Between on or about the eighth day of September, 1982 and on or about the twenty-first day of December, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such, in that he falsely identified himself to Raymond Gordon as an employee of the Social Security Administration and falsely informed him that payments of Social Security benefits had been made to him in

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the defendant with a section 912(2) offense. Specifically, those counts charged that "William A. Wilkes, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00, [$100.00, $100.00, $100.00, $60.00, $125.00, $64.00, $64.00, $50.00, and $50.00] from Raymond Bender."[4] We conclude that because the statutory language contains all of the necessary elements of the offense and because the indictment tracks the statutory language the indictment is sufficient to withstand defendant's challenges. The government thus met the burden of proof.

We therefore will affirm the judgment and sentence below.

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excess of the amounts to which the said Raymond Bender was lawfully entitled.

In violation of Title 18, United States Code, Section 912. Appendix at 1a.

4. Counts II through XI of the indictment charged that on or about September 8, 1982, September 10, 1982, September 13, 1982, September 14, 1982, September 15, 1982, September 16, 1982, December 7, 1982, December 10, 1982, December 15, 1982 and December 21, 1982, "William A. Wilkes, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00, [$100.00, $100.00, $100.00, $60.00, $125.00, $64.00, $64.00, $50.00, and $50.00] from Raymond Bender in violation of Title 18, United States Code, Section 912." Appendix at 1a-2 to 1a-11.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX 1a-BL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5301

UNITED STATES OF AMERICA

v.

WILKES, WARREN A. a/k/a John Williams

Warren A. Wilkes,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA - PITTSBURGH
(D.C. Criminal No. 83-00006-01)

Submitted Pursuant to Rule 12(6)
January 10, 1984
Before: ALDISERT, HIGGINBOTHAM and SLOVITER,
Circuit Judges.
(Filed: April 19, 1984)

ORDER AMENDING OPINION

The court having discovered that the slip opinion prepared by the printer does not conform with the original opinion filed April 19, 1984, it is ORDERED that the slip opinion be corrected as follows:

Page 6, 2nd line from bottom above footnote -- insert the word "the" to read: count one of the indictment

APPENDIX 2a-1

Page 7, 17th line from bottom -- insert the word "that" to read: more than that the defendants

Page 8, 9th line from top -- correct spelling of last word to read: section

Page 8, 17th line from top -- insert the word "elbow" after "91222" to read: (5th Cir. 1965)section 91222 elbow).

Page 9, 4th line from top -- the first letter of "Reviewer's" should be written in lower case to read: reviewer's

Page 9, 20th line from top -- insert the word "section" after "under" to read: under section 91222.

Page 9, 22nd line from top -- replace the word "to" with the word "are" to read: 1948 are directly

Page 11, 13th line from bottom -- the citation "F.22nd" should read: F.2d

Page 14, last line of footnote 5 -- the phrase "Appendix at 1a-2 to 1a-11." should be placed two spaces below the line, section 912.", and flush with the left margin to read

section 912."

Appendix at 1a-2 to 1a-11.

BY THE COURT:

A. Leon Higginbotham, Jr.

Circuit Judge

DATED: May 11, 1984

APPENDIX 2a-2

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX 3a-3b

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	Criminal No. 58-66
v.	18 U.S.C., Section 912
RAYMOND A. WILKES, a/k/a John Williams	

The Grand Jury charges:

Between on or about the eighth day of September, 1962 and on or about the twenty-first day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, RAYMOND A. WILKES, a/k/a John Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such, in that he falsely identified himself to Raymond Bender as an employee of the Social Security Administration and falsely informed him that payments of Social Security benefits had been made to him in excess of the amounts to which the said Raymond Bender was lawfully entitled.

In violation of Title 18, United States Code, Section 912.

6

APPENDIX 3a-1

COUNT TWO

The Grand Jury further charges:

That on or about the eighth day of September, 1961 at Pittsburgh, in the Western District of Pennsylvania, Eudora A. Elliott, a/k/a Jane Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2.

COUNT THREE

The Grand Jury further charges:

That on or about the ninth day of September, 1993, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. GILLESS, a/k/a John Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-3-

COUNT FOUR

The Grand Jury further charges:

That on or about the thirteenth day of September, 1962, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-4a

COUNT FIVE

The Grand Jury further charges:

That on or about the fourteenth day of September, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-5.

COUNT SIX

The Grand Jury further charges:

That on or about the fifteenth day of September, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00 from Raymond Tender.

In violation of Title 18 United States Code, Section 913.

APPENDIX 3a-6

COUNT SEVEN

The Grand Jury further charges:

That on or about the sixteenth day of September, 1981, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $125.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2

COUNT EIGHT

The Grand Jury further charges:

That on or about the seventh day of December, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $64.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2

COUNT NINE

The Grand Jury further charges:

That on or about the tenth day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, [redacted] WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $66.30 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-9

COUNT TEN

The Grand Jury further charges:

That on or about the fifteenth day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, [redacted] A. WILKES, a/k/a Jane Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $50.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-10

COUNT ELEVEN

The Grand Jury further charges:

That on or about the twenty-first day of December, 1981, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILSON, a/k/a Jack Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $50.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

Foreman

J. ALAN JOHNSON
United States Attorney

APPENDIX 3a-11

(continued from Page 1 if more space needed)

CHECK ONE

COUNT NO.	U.S. CODE	OFFENSE	FELONY	MINOR OFFENSE	OTH MISDE
1	1001(2	Did falsely pretend and assume to be an employee of the U.S. acting under the authority thereof, and did falsely take upon himself to act as such in that he falsely identified himself to another as an employee of the Social Security Administration and falsely informed another that payments of Social Security benefits had been made to him in excess of the amount to which he was lawfully entitled.	XX		
2 - 11	1001(2	Did falsely pretend to be an officer and employee of the U.S. acting under the authority thereof, and in such pretended character did obtain money.	XX		

I certify that, to the best of my knowledge, the above entries are true and correct.

DATE: January 18, 1983 ATTORNEY at Law: [signature]
[illegible]
Assistant U.S. Attorney

APPENDIX 3a-12

ORIGINAL

No. 83-6043

Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT A. WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether an indictment that charges impersonation of a government employee in the language of 18 U.S.C. 912 nevertheless must be dismissed because it fails expressly to allege an intent to defraud.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-6043

DAVID A. KILLEA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals as amended (Pet. App. 1a1-1a14, 2a1-2a3) is reported at 732 F.2d 1154.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1984. The petition for a writ of certiorari was filed on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of falsely pretending to be an employee of the United States and acting as such (count 1), and falsely pretending to be an employee of the United States and obtaining money in that character (counts 2-11), in violation of 18 U.S.C. 912. He was sentenced to concurrent sentences of 18 months' imprisonment on counts 1 and 2, sentence on the remaining counts was suspended in favor of five years' probation.

1. The evidence showed that on numerous occasions petitioner telephoned Raymond Bender, a disabled veteran, and

falsely identified himself as an employee of the Social Security administration named "Jack Williams." During these calls petitioner declared that Bender had received overpayments of disability benefits, and informed Bender that he would have to refund a portion of the payments to remain eligible for future benefits. After each of these conversations petitioner visited Bender at his home, claimed to be Jack Williams, and demanded that Bender give him cashier's checks in the amounts of the "overpayments," payable to Herbert A. Williams. Using this method petitioner obtained payments in amounts ranging from $50 to $125 (Pet. App. 2a)-(3a).

Bender's employer ultimately became suspicious of petitioner and filed a complaint with the Federal Bureau of Investigation. With Bender's consent, FBI agents recorded a December 20, 1982 telephone conversation between Bender and a person identifying himself as Jack Williams. During the conversation the caller told Bender that he had to repay $50. The following day petitioner arrived at Bender's residence claiming to be Jack Williams. He collected the $50 and was arrested on the scene by FBI agents (Pet. App. 3a).

2. Petitioner was indicted on 11 counts of violating Section 912. The first count of the indictment alleged that petitioner "did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof * * * and did falsely take upon himself to act as such" (Pet. App. 28). The remaining 10 counts declared that petitioner "did falsely pretend to be an officer and employee of the United States acting under the authority thereof * * * and in such pretended character did obtain" various sums from Bender (Pet. App. 3a)-(5a). At the close of the government's case petitioner moved the district court to dismiss the indictment for failure specifically to charge "intent to defraud." The motion was

denied, and the jury returned a verdict of guilty on all 11 counts (Pet. App. 1a4).

On appeal petitioner challenged the denial of the motion to dismiss. The court of appeals affirmed, explaining that Section 312 does not in terms require an intent to defraud. While noting that the Fifth Circuit has ruled that intent to defraud must expressly be charged in a Section 312 indictment, [1] the court below concluded "that 'intent to defraud' * * * could reasonably have been considered by Congress to be present whenever the elements retained in section 312 are present" (Pet. App. 1a12). The court of appeals therefore held that "the statutory language contains the necessary elements of the offense and an indictment alleging all of the necessary elements is sufficient" (Pet. App. 1a13). In reaching this conclusion the Third Circuit aligned itself with the six other Circuits that do not require a Section 312 indictment specifically to charge intent to defraud, so long as the indictment tracks the statutory language. [2]

ARGUMENT

1. The controversy in this case concerns the 1968 revision of section 472. Prior to that year, conviction under 18 U.S.C. 76 (1940), the predecessor to Section 312, expressly required an "intent to defraud either the United States or any person." In 1945, however, in United States v. Lemaster, 328 U.S. 746 (1946), this Court upheld the validity of an indictment under Section 312's predecessor that did not specifically allege an intent to defraud, explaining that "the words 'intent to

[1] United States v. Tannian, 464 F.2d 367 (5th Cir. 1972); Brown v. United States, 364 F.2d 748 (5th Cir. 1966).

[2] United States v. Dark, 531 F.2d 1323 (7th Cir. 1976); United States v. Bullock, 517 F.2d 994 (9th Cir. 1975); United States v. Brown, 518 F.2d 932 (D.C. Cir. 1975); United States v. Ward, 512 F.2d 12 (2d Cir. 1974), vacated on other grounds, 423 U.S. 1011 (1975); United States v. Briggs, 458 F.2d 452 (6th Cir.), cert. denied, 409 U.S. 863 (1972); United States v. Sansone, 457 F.2d 548 (4th Cir. 1967).

defraud,' in the context of this statute, do not require more than that the defendants here, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct" (id. at 704). When the criminal code was revised in 1948 the "intent to defraud" language was deleted from what became Section 912, so that the statute now reads:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States * * * and [1] acts as such, or [2] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both. 1/

According to the Historical or Revision Notes, "[t]he words 'with the intent to defraud the United States or any person' * * * were omitted [from the revised section] as meaningless in view of" Logowitch. Legislative Note, 18 U.S.C. 912.

In subsequent decisions the Fifth Circuit declared that, despite the 1948 revision, intent to defraud remained an "essential element" of both Section 912[1] and Section 912[2], and therefore had to be alleged in an indictment under those provisions. United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972); Bones v. United States, 344 F.2d 796, 803 (5th Cir. 1965). The court below, in contrast, concluded "that 'intent to defraud' as defined by Logowitch" exists "whenever the elements retained in section 912 are proven," so that "an indictment alleging violations of [Section 912] need not specifically allege an intent to defraud" (Pet. App. 1a12). Petitioner maintains that the ruling below cannot be reconciled with the Fifth Circuit decisions.

1/ In conformity with the practice of the courts of appeals, bracketed numbers have been inserted within the statutory text to identify the two offenses created by Section 912. See Pet. App. 1a5 n.2; United States v. Rosser, 528 F.2d 652, 654 n.4 (D.C. Cir. 1976).

2. In fact, however, the disagreement between the courts of appeals about Section 912 is semantic rather than substantive, because the court below and the Circuits that it followed accord essentially the same meaning to the statute as does the Fifth Circuit. Thus the Fifth Circuit's definition of fraudulent intent for purposes of clause [1] of Section 912 echoes Lepowitch: it is "the intent by artifice and deceit to cause another to follow some course he would not have pursued but for the deceitful conduct." Randolph, 460 F.2d at 370. That court also has defined the requisite mental state for a violation of clause [2] as "an intent to wrongfully deprive another of property." Howes, 344 F.2d at 803.

Despite petitioner's suggestion to the contrary, the other courts of appeals, including the court below, essentially have embraced the same definitions of the mental element of a Section 912 violation. While these courts do not require that a Section 912 indictment specifically allege intent to defraud, as does the Fifth Circuit, they take this position only because they have concluded that a person who commits the acts described in the statute necessarily has such an intent -- and they define that intent in terms very similar to those used by the Fifth Circuit.

So far as Section 912[1] is concerned, for example, the District of Columbia Circuit explained, in language identical to that used by the Fifth Circuit, that "virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting 'as such' seeks 'to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.'" United States v. Foster, 528 F.2d 652, 656 (D.C. Cir. 1976), quoting Lepowitch, U.S. at 704. Similarly, the Seventh Circuit noted in a case under Section 912[2] that "where one is deceived into giving up something of value, as required by the second part of the

statute, it is * * * implausible that the purpose is pure. Thus there need be no allegation of fraudulent intent since allegation of acts sufficient to violate part two [of Section 912] would satisfy the Isgouith definition." United States v. Dard, 654 F.2d 490, 492 (7th Cir. 1981). The decision below accepted these readings of the statute, declaring that "[a]n intent to defraud as defined in Isgouith is present for a section 912[1] offense whenever the element of 'acting as such' is proven * * * . Similarly, an intent to defraud is present for purposes of a section 912[2] offense whenever one demands or receives money * * * in 'pretended character,' acting under the authority of the United States" (Pet. App. 1a12-1a13). Thus there is no basic disagreement between the Fifth Circuit and the court below either about the meaning of Section 912 or about the type of conduct that amounts to a violation of the statute. 5/

Similarly, the concerns that led the Fifth Circuit to require that intent to defraud be alleged in the indictment are satisfied by the reading given the statute in this case. There is no danger that Section 912[1] will be used to punish "a[e]re foolish threats" (Randolph, 460 F.2d at 370), because that provision has been interpreted to apply only to persons who "'seek[] "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct"'" (Pet. App. 1a11, quoting Hosser, 520 F.2d at 656, in turn quoting

5/ While the Fifth Circuit maintains that intent to defraud remains an element of a Section 912[1] violation, it does not require for conviction that the defendant have attempted to extract something of value from the victim; it is enough that the defendant attempted to change the victim's course of conduct. See Randolph, 460 F.2d at 370; compare Hosser, 520 F.2d at 656. Conversely, while other Circuits suggest that the 1948 revision of the criminal code removed intent to defraud as an element of Section 912[2] (see Dard, 654 F.2d at 492), those courts nevertheless agree that "the second part of the statute clearly requires that money * * * or other things of value be gotten because of the [defendant's] pretense," and therefore that "the victim has been deceived into giving them" (ibid. (emphasis in original)). Compare Hosser, 520 F.2d at 655.

Leyneliah, 318 U.S. at 704). And an indictment cast in the language of Section 912[2] adequately "apprise[s] the defendant of what he will have to meet" (Hanes, 344 F.2d at 104), because that language was read by the court below to "contain[] the necessary elements of the offense" (Pet. App. 1a13) -- including the element of "'intent to defraud' as defined by Leyneliah" (Pet. App. 1a12).

The omission of an intent to defraud allegation from the indictment therefore had no effect in this case. The indictment "track[ed] the statutory language" (Pet. App. 1a14), thus essentially accusing petitioner both of "seek[ing] 'to cause [Bender] to follow some course of would not have pursued'" (Foster, 528 F.2d at 656, quoting Leyneliah, 318 U.S. at 704), and of "deceiving [him] into giving up something of value" (Ford, 654 F.2d at 492). The indictment also outlined a complex scheme on petitioner's part to obtain money from Bender under false pretenses. 1/ Plainly, an indictment cast in these terms accused petitioner of engaging in more than "bravado," and fully apprised him of the government's allegations.

The addition of the words "intent to defraud" would not have changed the substance of the allegations or made petitioner aware of an element of the government's case that otherwise took him by surprise. Because any disagreement between the Fifth Circuit and the court below over the proper form of a Section 912 indictment therefore does not present an issue of significance, review of this case is unwarranted.

1/ The indictment alleged that petitioner "falsely identified himself to Raymond Bender as an employee of the Social Security administration and falsely informed him that payments of Social Security benefits had been made to him in excess of the amounts to which the said Raymond Bender was lawfully entitled" (Pet. App. 1a1). The indictment went on to allege that while in this "pretended character" petitioner obtained various sums from Bender (Pet. App. 1a2-1a11).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN A. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

SEPTEMBER 1984

SUPREME COURT OF THE UNITED STATES

WARREN A. WILKES *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 69-4965. Decided October 20, 1969

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting from the denial of certiorari.

Posing as a social security administration employee, petitioner Warren Wilkes told a benefit recipient that social security overpayments had been made. Wilkes demanded a return of the overpayments, and in this manner repeatedly obtained money. As a result, Wilkes was charged with violating the second clause of 18 U. S. C. §912, which prohibits demanding or obtaining anything of value while impersonating an officer or employee of a United States agency or department.*

At the end of the prosecution's case, Wilkes moved to dismiss the indictment for failure to charge intent to defraud in any of the counts. The district court denied the motion. The judge found that although the indictment did not specifically allege an intent to defraud, it did charge, in the exact terminology of the statute, that petitioner pretended to be an employee of the United States acting under the authority thereof, and that acting as such and in such pretended character he demanded and obtained money from the victim in violation of the law. The jury found Wilkes guilty on all

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*This 18 U. S. C. §912 provides:

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [clause one] acts as such, or [clause two] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years."

curiae. The Third Circuit affirmed, holding that since the intent to defraud language was deleted from the statute in a 1948 revision, such an intent need not be specifically pleaded and proven. This rule is consistent with the approach of six other circuits. *See United States* v. *Corral*, 434 F. 2d 490 (CA7 1961); *United States* v. *Robbins*, 613 F. 2d 688 (CA8 1979); *United States* v. *Russow*, 174 U. S. App. D. C. 79, 528 F. 2d 632 (CADC 1976); *United States* v. *Ross*, 500 F. 2d 12 (CA2 1974), vacated on other grounds, 422 U. S. 1001 (1975); *United States* v. *Wilmon*, 459 F. 2d 451 (CA9 1972), cert. denied, 409 U. S. 863 (1972); *United States* v. *Guiliano*, 397 F. 2d 869 (CA4 1967).

The rule in the Fifth Circuit, however, is otherwise. *See United States* v. *Cohen*, 631 F. 2d 1223 (CA5 1980); *United States* v. *Randolph*, 460 F. 2d 367 (CA5 1972); *Brown* v. *United States*, 344 F. 2d 799 (CA5 1965). The Fifth Circuit views Congressional deletion of the intent to defraud language as merely an attempt to make statutory wording conform to authoritative judicial construction. As the Fifth Circuit sees it, the legislative history indicates that Congress labored under a misconception over what the prevailing judicial interpretation required. *Id.*, 344 F. 2d at 802. Thus, intent to defraud is still an element of the offense and must be specifically alleged in the indictment.

The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal statutes should turn on uniform law, not geography. I would grant certiorari to resolve the conflict among the circuits.

JUSTICE BLACKMUN would grant certiorari and summarily affirm the judgment of the Court of Appeals.